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Supreme Court of the United States

OCTOBER TERM 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California

BRIEF AMICUS CURIAE OF COUNTY OF SAN DIEGO IN SUPPORT OF APPELLEE

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BRIEF AMICUS CURIAE OF COUNTY OF SAN DIEGO IN SUPPORT OF APPELLEE

INTEREST OF THE AMICUS CURIAE

Amicus County of San Diego, a political subdivision of the State of California, is responsible for planning and zoning decisions within its jurisdiction and is thus interested in and affected by the decision here under review.

Prior to the California Supreme Court's decision here, the state of the law concerning the inverse condemnation remedy for planning and zoning activities of local government in California allowed property owners to effect a forced acquisition

upon public entities of multi-million dollar properties resulting from unintentional errors of legislative and administrative judgment in land use planning, properties which the public agency had no intention of acquiring and no public need to acquire. The County of San Diego and other local governments in California have been affected by such judgments of forced acquisition which if upheld could potentially bankrupt some local governments. In this manner, such a damage remedy was subject to severe abuse.

It is the County's position that the decision of the California Supreme Court here under review is constitutionally sound and reflects the proper balance of private and public interests involved in local land use planning by holding that government may never engage in an unlawful exercise of its police power under any circumstances, and when such occurs, it must be invalidated. The decision recognizes that to require government to legitimatize an unlawful exercise of the police power by paying money damages in inverse condemnation is not only constitutionally unsound but has broad harmful effects on government's ability to effectively regulate land use and to remain solvent under modern fiscal restraints on local government.

QUESTIONS PRESENTED

1. Are appellants barred from receiving the relief they request for having failed to exhaust their administrative remedies?

2. Is it proper for this Court to reach the question of constitutionally permissible remedies for excessive land use regulations where it has been reasonably determined that the ordinance here in question is not excessive as a matter of law?

3. Does it violate the Fifth and Fourteenth Amendments to the United States Constitution for California to provide that

judicial invalidation is the only remedy available to a property owner whose property is affected by an alleged excessive regulation?

4. Do constitutional precedent and social policy considerations favor affirming the decision below since said result affords governmental entities maximum flexibility in dealing with land use problems?

STATEMENT OF THE CASE

The County of San Diego adopts the account of the facts and procedural posture of the case as stated in the Appellants' Brief.

ARGUMENT

I

APPELLANTS ARE BARRED FROM RECEIVING THE RELIEF THEY REQUEST FOR HAVING FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

Appellants' complaint asserts that Ordinance No. 124 (N.S.) of the City of Tiburon "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever" (Complaint, Paragraph IX). And yet, in appellants' "Statement of the Case" herein, it is admitted that said ordinance authorized "(1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of the buildings was limited to not less than one unit per five acres nor more than one unit per acre" (Appellants' Brief, page 7).*

Appellants have never attempted to develop their property though residential development is clearly permitted. Appellants have never submitted a tentative parcel map for local govern-

*Ordinance No. 124 (N.S.) was incorporated by reference in appellants' complaint.

ment approval. Appellants have never applied for special or conditional use permits, nor have they applied for administrative relief via rezoning or applied for a zoning variance.

The doctrine of the exhaustion of administrative remedies closely parallels the constitutional doctrine of "ripeness." Said doctrine has been defined by the California Supreme Court as follows:

> ". . . In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. . . ." (*Abelleira* v. *District Court of Appeal* [1941] 17 Cal.2d 280, 292.)

The California courts have consistently followed the rule that a court does not have jurisdiction to determine the rights of a litigant unless the party seeking relief has first exhausted his administrative remedies (*Abelleira* v. *District Court of Appeal, supra,* at page 292). The issue of exhaustion of administrative remedy may be raised in California by demurrer on the grounds that the complaint does not state facts sufficient to constitute a cause of action or that the court lacks jurisdiction of the subject of the cause of action (*Igna* v. *City of Baldwin Park* [1970] 9 Cal.App.3d 909).

The purpose of requiring the exhaustion of administrative remedies is to eliminate any question as to how the legislative body would act with respect to a specific situation. In the case of zoning ordinances, the Court in *Metcalf* v. *County of Los Angeles* (1944) 24 Cal.2d 267, 270-271, stated:

> "A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections. . . . Consequently, almost every zoning ordinance, including the one under consideration, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use. As stated in *Thomas* v. *Board of Standards and Appeals,* 263 App.Div. 352 [33 N.Y.S.2d 219, 230], 'the variances permitted by the Zoning Resolution are in the nature of safety valves to prevent the oppressive operation of the Zoning Regulations in particular instances. . . . In our opinion, until an application for a variance or exception is made and acted upon, the 'legislative process remains incomplete.' (*Porter* v. *Investors Syndicate,* 286 U.S. 461, 468. . . .)"

Having failed to exhaust their administrative remedy, appellants' case is not ripe for constitutional adjudication and this Court should deny appellants relief on that basis alone. As this Court stated in *Parker* v. *Los Angeles* (1949) 338 U.S. 327, 333, "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

II

IT IS NOT PROPER FOR THIS COURT TO REACH THE QUESTION OF CONSTITUTIONALLY PERMISSIBLE REMEDIES FOR EXCESSIVE LAND USE REGULATIONS WHERE IT HAS BEEN REASONABLY DETERMINED THAT THE ORDINANCE HERE IN QUESTION IS NOT EXCESSIVE AS A MATTER OF LAW.

The question of what remedy is constitutionally required in cases of alleged excessive land use regulation need only be addressed in a case where an excessive regulation is found.

The California Supreme Court has found that the Tiburon Ordinance here in question allows appellants to build between one and five residences on their property in contradiction to appellants' claim that development of their land is forever pre-

vented and taking cognizance of the use which appellants were entitled to make of their land found that the trial court was justified in finding that the ordinance did not unconstitutionally interfere with appellants' entire use of the land or impermissibly decrease its value (*Agins* v. *City of Tiburon* [1979] 24 Cal.3d 266, 277).

The County of San Diego contends that it was not improper on the facts of this case for the California Supreme Court to have concluded that, as a matter of law, the Tiburon Ordinance did not constitute an unconstitutional taking of appellants' property. It follows that the question of what remedy is constitutionally required under an excessive land use regulation may be reserved for another day.

III

IT DOES NOT VIOLATE THE FIFTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR CALIFORNIA TO PROVIDE THAT JUDICIAL INVALIDATION IS THE ONLY REMEDY AVAILABLE TO A PROPERTY OWNER WHOSE PROPERTY IS AFFECTED BY AN ALLEGED EXCESSIVE LAND USE REGULATION.

The issue in this case is a very limited one: May a state, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, limit the availability of damages under a theory of inverse condemnation to a landowner where a public agency has adopted a zoning ordinance which substantially limits the use of his property. The California Supreme Court in *Agins* v. *City of Tiburon, supra,* at pages 269-270, held that a landowner who is "so aggrieved may challenge both the constitutionality of the ordinance and the manner is which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he

may not recover damages on the theory of inverse condemnation."

The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use without just compensation." The mandate of this clause is simply that a person should not have to sacrifice his or her property to the public unless he or she is justly compensated. In cases of excessive land use regulations California has fashioned a remedy which satisfies the Fifth Amendment. The remedy is one that precludes the payment of damages which ratifies and transmutes an otherwise unconstitutional taking, but rather is one which allows the aggrieved property owner to challenge an alleged excessive regulation and thereby effect a repeal or rescission of the illegal action. If the aggrieved property owner is successful, the result is that an uncompensated taking is avoided. This is all that is required by the Fifth and Fourteenth Amendments.

This Court has always recognized the right of government, for the purpose of promoting the health, safety, morals or general welfare, to enact reasonable land use regulations and that such regulations do not constitute a "taking" under the Fifth and Fourteenth Amendments even though such regulations may prohibit or severely limit the most beneficial use of the property subject to the regulation (*Andrus* v. *Allard* [1979] ..... U.S. ....., 62 L.Ed.2d 210, 222-224; *Pennsylvania Central Transportation Co.* v. *New York City* [1978] ..... U.S. ....., 57 L.Ed.2d 631, 648-651). The test of "reasonableness" usually has been applied in determining the validity of land use regulation for such purposes (see, e.g., *Goldblatt v. Town of Hampstead* [1962] 369 U.S. 590, 592-596, 8 L.Ed.2d 130, 133-134). Judicial invalidation has been recognized by this and lower federal courts as a proper remedy in cases of excessive land use regulations. In *Pennsylvania*

Coal Co. v. *Mahon* (1922) 260 U.S. 393, plaintiff real property owners sought to enjoin defendant coal company from mining under its land. Under an 1878 deed, the coal company had transferred the subject property to the plaintiffs but had expressly reserved the right to remove all the coal under said property. In 1921, Pennsylvania adopted the Kohler Act which by its terms purported to take away pre-existing rights to mine under residential property. In discussing the Kohler Act, the Supreme Court held:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." (*Pennsylvania Coal Co.* v. *Mahon, supra,* at page 414.)

The Court thereby remedied the illegal regulation by finding it invalid, at least in part. Though money damages were not in issue in *Pennsylvania Coal Co., supra,* the holding does support the proposition that judicial invalidation *is* a constitutionally permissible remedy in cases of excessive land use regulations.

The case of *Harrisonville* v. *Dickey Clay Co.* (1933) 289 U.S. 334 involved a suit by a company against a city for damages and injunctive relief in conjunction with injury to the company's property due to a city sewage plant. In *Harrisonville* the plaintiffs wanted injunctive relief whereas the city argued that they were entitled at most to damages. The Court's dicta explicitly recognizes that either damages or injunctive relief would satisfy the illegal taking of plaintiffs' property, and therefore allowed non-constitutional equitable principles to determine the outcome. (*Harrisonville* v. *Dickey Clay Co., supra,* at pages 339-341.)

Other federal courts have also recognized the propriety of judicial invalidation in cases of excessive land use regulations. (*Union Oil Company of California* v. *Morton* [9th Cir. 1975] 512 F.2d 743; *Art Neon Co.* v. *The City and County of Denver* [D. Colo. 1973] 357 F.Supp. 466.)

The above case law demonstrates that the requirements of the Fifth Amendment *can* be satisfied by invalidating offensive regulations. The decision of the California Supreme Court in *Agins* is a reasonable approach to developing remedies to solve the traditional "all-or-nothing" dichotomy between "just compensation" required for property taken by government under its power of eminent domain and the "no compensation" required for the governmental regulation of property under the police power, which includes zoning ordinances. In many cases, it is difficult to draw the line between a non-compensatory regulation and one that becomes a taking and invalid unless compensation is paid. Why should the remedy in such circumstances be left totally to the discretion of the landowner (or his attorney)? Certainly, there is no reason in either court precedent or in common sense why a property owner as a matter of federal constitutional law must be given a choice other than that established by the California Supreme Court in the *Agins* case.

IV

CONSTITUTIONAL PRECEDENT AND SOCIAL POLICY CONSIDERATIONS FAVOR AFFIRMING THE DECISION BELOW SINCE SAID RESULT AFFORDS GOVERNMENTAL ENTITIES MAXIMUM FLEXIBILITY IN DEALING WITH LAND USE PROBLEMS AND REASONABLY PROTECTS THE RIGHTS OF PROPERTY OWNERS.

Though appellants claim that social policy considerations favor reversal, the California Supreme Court correctly evaluated the social policy issue when it stated in the decision here on review:

> ". . . The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to

preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people 'problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and operation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, ... (*Euclid* v. *Ambler Co.* [1926] 272 U.S. 365, 386-387 . . . .)" (*Agins* v. *City of Tiburon, supra,* at page 275.)

Respected constitutional precedent such as *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365 counsels that modern urbanization requires that government be given broad increasing latitude in dealing with land use problems. The *Agins* case is consistent with the spirit of such precedent.

If a private property owner is given the alternatives of either challenging an unconstitutional regulation or seeking damages for inverse condemnation, then the public may be required to obtain unwanted real property at great expense to the taxpayer. Truly, "government by purchase" becomes the norm. The possibility of windfall to the property owner cannot be overlooked.

As the continued effects of inflation and a tax revolution make fiscal planning more and more difficult for state and local entities, sound public policy favors the solution of the *Agins* case. Though the Fifth Amendment mandates that government shall not take private property without paying just compensation, nothing in such constitutional provision requires that the personal interests of a private citizen take priority over the public interest.

Under a system allowing only judicial invalidation, the defendant public entity actually has three alternatives: (1) if the challenged regulation is found to be invalid, the public entity may chose to do without the offending regulation; or (2) the public entity can institute eminent domain proceedings to acquire the property; or (3) it may amend the regulation consistent with constitutional requirements.

If appellants contentions are accepted, public entities will be forced to pay tremendous sums of money when slight errors of legislative judgment result in a judicial finding of an illegal taking. Once such a money judgment is entered, even repealing the regulation will not satisfy the legal obligation to satisfy the previously entered money judgment.

CONCLUSION

Appellants should receive no relief from this Court for several reasons. First, this case is not ripe for constitutional adjudication since appellants did not exhaust their administrative remedies. Secondly, the remedy issue need not be reached on the facts of this case since it has reasonably been found below that as a matter of law appellants have not been deprived of substantially all of the value of their property.

Should this Court reach the "remedy" issue, it is urged that both precedent and public policy favor affirmance of the decision of the California Supreme Court. It has been the central theme of this brief that the Fifth and Fourteenth Amendments do not dictate any particular remedy as long as the result is that private property is not taken without just compensation. Surely appellants would concede that, if Ordinance No. 124 (N.S.) of the City of Tiburon had been struck down as unconstitutional, their Fifth Amendment rights would thereby have been vindi-

cated. Therefore, since judicial invalidation satisfies the Fifth Amendment, there is no reason that a state must permit a property owner the alternative remedy of damages under a theory of inverse condemnation. For these reasons, the County of San Diego asks this Court to affirm the decision below.

DATED: March 20, 1980.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1980, three copies of the Brief Amicus Curiae of County of San Diego in Support of Appellee were mailed, postage prepaid, to each of the following named persons:

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I further certify that all parties required to be served have been served.

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